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**In the
Supreme Court of the United States**

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OCTOBER TERM, 1944

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No. 466

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SKINNER MANUFACTURING COMPANY,
A Nebraska Corporation,

Petitioner,

vs.

GENERAL FOODS SALES COMPANY,
a Delaware Corporation,

Respondent.

— 0 —
**ON PETITION FOR A WRIT OF CERTIORARI TO
THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**

— 0 —
PETITIONER'S REPLY BRIEF

— 0 —
WILLIAM RITCHIE,
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Counsel for Petitioner.



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STATEMENT OF CASE

In the United States Circuit Court of Appeals, the Respondent argued that the law and facts in this case were so well stated in the Trial Court's Opinion that Respondent placed its chief reliance upon that opinion; in its Opinion the United States Circuit Court of Appeals

accepted the Trial Court's Opinion as a foundation upon which to predicate its decision (T. Vol. VI, pp. 4, 5). It is apparent from Respondent's Brief in Opposition to Writ of Certiorari that Respondent relies upon the Trial Court's Opinion as the answer to Petitioner's Brief.

In the United States Circuit Court of Appeals, the Respondent argued that under Federal Rules of Practice No. 52, the Findings of the Trial Court were binding upon the Circuit Court of Appeals, and not subject to review in that Court on appeal, and the Circuit Court of Appeals in its Opinion disposed of the issues of fact on that basis. In referring to the issue of secondary meaning, the Circuit Court said: "Under the evidence, the issue was one of fact to be tried and determined by the Trial Court, and its determination is binding upon this Court" (T. Vol. VI, pp. 8, 9). On the only other issue discussed by the Court, the Circuit Court of Appeals said: "The questions whether the appellees have furnished adequate means to identify their products and to distinguish them from appellant's product, and whether the similarities which exist between the packages used by appellees and the packages used by appellant have caused or are likely to cause confusion in the trade, were, we think, questions of fact for the Trial Court to determine" (T. Vol. VI, p. 10).

These findings of fact of the Circuit Court of Appeals were predicated upon the Court's conclusion that because the term "Raisin-BRAN" contained words descriptive of ingredients of the product, it could not become a technical trade-mark, and unless it was a technical trade-mark, the term was not entitled to protection

against infringement by the exact use of that term (T. Vol. VI, pp. 9, 10).

The Respondent, in its Brief in Opposition, now insists, "The simple answer to all this is that, under modern federal equity practice, appellants have no right to a trial de novo in the Appellate Court. * * * The language of R. C. P. 52 is not only virtually identical, but was intended by the lawyers who framed the rules to accord 'with the decisions on the scope of review in modern federal equity practice' " (Respondent's Brief, p. 3).

ARGUMENT

Re Petitioner's Brief.

Respondent, at the outset of its Brief, seeks to secure a dismissal of Petitioner's Petition for Writ of Certiorari on the ground that the Petitioner's Brief is not "direct and concise." By this the Respondent assumes that "direct and concise" means "fewer-paged."

Respondent, in this case, as in the Circuit Court of Appeals, places its reliance upon an extensive Opinion of the Trial Court (52 F. S. 432-452), in which Opinion the Trial Court raises many points and states many legal conclusions, some of which are clearly erroneous, and upon which conclusions it is clear it predicated the findings of fact upon which the judgment was based.

The record in this case is a large record with over 200 witnesses and many hundreds of Exhibits. The Petitioner had the duty of presenting to this Court as clearly and concisely as it could, a statement of facts predicated

upon this voluminous record and a discussion of numerous issues of law and fact raised in the Trial Court's Opinion; and it is submitted that the question as to whether or not Petitioner's Brief is concise and direct must be determined by the method in which it handled the numerous issues involved, and not by the number of pages required to meet those issues. Petitioner submits that its Brief is as direct and concise as was reasonably possible, considering verity (in the face of the large record), clarity and the issues involved, and this is demonstrated by the ease with which the Brief may be read and the fact that the Respondent has not found it necessary to challenge any statements with respect to the facts made in Petitioner's Brief. Surely the amount of work involved in determining the rights of the parties in this case is not ground for refusal to allow the Petition; and it is submitted that the importance to commerce and trade throughout the country of a proper determination of the numerous issues raised in the Trial Court's lengthy Opinion, furnishes ground for the allowance of the Writ, in that it will permit of a clarification by this Court of a substantial portion of the law with respect to unfair competition through the use of competitor's trade-marks and trade names, where such marks or names contain words descriptive of ingredients of the product.

Re Reasons Relied Upon for Allowance of Writ.

The Respondent insists that the reasons relied upon by Petitioner for allowance of the Writ (Petition for Writ of Certiorari, pp. 18-23) do not conform to the requirements of this Court's Rule 38 (5) (b). Respondent

does not attempt to point out that there is not a conflict of decisions between Circuit Courts of Appeal as pointed out in the Petition for the Writ and in Petitioner's Brief in support thereof, but insists that the following portion of Supreme Court Rule 38 (5) (b),—"A decision in conflict with decisions of other circuit courts of appeal on the same matter,"—refers only to decisions with respect to the same trade-mark. Respondent does not submit any authorities, but attempts to strain the word "matter" as used in the rule to an extent which this Court has not followed in allowing Petitions for Writs of Certiorari which are granted by the Court "in order to secure uniformity of decision." *Hamilton Brown Shoe Co. v. Wolf Bros Co.*, 240 U. S. 251, 258.

Respondent also ignores the fact that this Court has not had occasion to make definite pronouncements as to the application of Federal Rule of Procedure 52 to the review of facts by a United States Circuit Court of Appeals in an equity case, and ignores the fact that there are conflicting decisions between the Circuit Courts of Appeal on this question.

Respondent also states "Alleged reasons (4), (6), (7), and (8)¹ are not even remotely related to anything found in Rule 38 (5) (b)." This is contrary to the decision of this Court in *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, 305 U. S. 315, 322, in which the Court said, "We granted certiorari on account of the importance in trade-mark law of the issues of the descriptive character of the mark and the effect of its

¹ Petition for Writ of Certiorari, pp. 20-23.

acquired meaning under the Trade Mark Act of 1920." In the Nu-Enamel Case, the question was raised as to whether or not a trade-mark which was composed of words descriptive of the product and which, by the admission of the defendant, had acquired a secondary meaning, was entitled to protection against infringement through the exact use of the term "Nu-Enamel." In the present case the same issue is raised, but in addition thereto, the question arises as to whether or not a term which had no exact meaning to the public prior to its adoption by the Petitioner, as its trade-mark, could acquire a secondary meaning so as to be entitled to the same protection as was afforded to the term "Nu-Enamel," and there is also a question involved as to whether or not a secondary meaning was acquired, and this question involves numerous other questions of law, among which are (a) does the case of *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, apply to such a case, or does the case of *Coca Cola Co. v. Koke Company*, 254 U. S. 143, apply; (b) can a term of a descriptive nature which is capable of acquiring a secondary meaning and which has been applied to an unpatented product, acquire such a meaning during the time that the product to which it is applied has no competition; (c) what proof is sufficient to establish a secondary meaning in a term which has descriptive characteristics, but which is capable of acquiring a secondary meaning; (d) was Petitioner's registration of the term "Raisin-BRAN" under the 1920 Trade Mark Act void as the Trial Court concluded (F. 11, T. 173). Other issues of importance were raised by the decision of the Trial Court and are discussed in Petitioner's Original Brief, but the foregoing are suffi-

cient to indicate that the case at bar is of national importance equal to, if not greater than the case of *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, supra.

Trial Court's Findings of Fact Not Conclusive.

Petitioner has pointed out in its original Brief that the Findings of Fact upon which the Trial Court predicated its Opinion were based upon erroneous conclusions of law and, as pointed out in the above statement, that the Opinion of the Circuit Court of Appeals is also predicated upon such erroneous conclusions.

Respondent calls attention to Findings of Fact 41 and 42 (T. 123) and contends that they definitely concluded the matter in favor of the Respondent, so that the facts with regard to such Findings were not open to review by the Circuit Court of Appeals. In making this argument, Respondent fails to recognize that the Findings quoted in Respondent's Brief must be read and considered together with the other Findings of the Trial Court with respect to that matter. Finding 41 must be read along with Findings 6, 8, 12 (T. 106-108) and 23 (T. 114), and Finding of Fact 25 must be read in connection with and considered along with Findings 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 (T. 106-115), and in this connection, Findings 6, 12, 15, 20, 23 and 24, should be read together. It is also to be noted that Finding 25 was predicated upon Conclusions of Law 5, 6, 7, 8, 9 and 15 (T. 124-126) and upon erroneous Conclusions of Law 10, 11, 12, 13, 14, 16 and 17 (T. 125-127), and upon erroneously failing to conclude as requested by

Petitioner's Requested Conclusions 3, 4, 5, 6, 7, 8 and 10 (T. 52-54).

It is further pointed out that Finding 42 (T. 123) is predicated upon erroneous Finding 25 and erroneous statements in Findings 37, 39 and 40 (T. 121-123) which erroneous statements were predicated upon the theory that a trade-mark which contained descriptive words could not acquire a secondary meaning in any event, and if it did, would not be entitled to protection against infringement of the exact use of such term, and such Findings were also founded upon the erroneous failure of the Lower Court to conclude as requested in Petitioner's Requested Conclusions 15, 16, 17, 18, 19, 25, 26 and 28 (T. 55-57).

The Respondent's contention that Findings 41 and 42 were reviewed by the Lower Court is not supported by a reading of the Lower Court's Opinion and it is apparent that the Lower Court accepted the Trial Court's Findings of Fact and Conclusions of Law and did not review the Findings of Fact, but considered itself bound by them.

Respectfully submitted,

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